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IN THE

Supreme Court of the United States

AT&T CORP.,

Petitioner,

v.

DARCY TING, AN INDIVIDUAL AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, AND CONSUMER ACTION, A NON-PROFIT MEMBERSHIP ORGANIZATION, BOTH AS PRIVATE ATTORNEYS GENERAL,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR BELLSOUTH CORPORATION, QWEST COMMUNICATIONS INTERNATIONAL INC., AND THE VERIZON TELEPHONE COMPANIES AS AMICI CURIAE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the court below erred in ruling that the long-standing federal displacement of state laws relating to the terms on which interstate telecommunications carriers provide service—a displacement mirrored in Congress's treatment of other national network industries—was erased when the Federal Communications Commission eliminated the requirement that carriers file tariffs as a mechanism for enforcing the governing federal statutory standards.

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This *amici curiae* brief is submitted in support of the petitioner, AT&T Corp.[1]

[1] This brief was prepared in its entirety by *amici curiae* and their counsel. No monetary contribution toward the preparation or submission of this brief was made by any person other than *amici curiae*, their members, and their counsel. By letters filed with the Clerk of the Court, petitioner and respondents have consented to the filing of this brief.

INTEREST OF AMICI CURIAE

Operating subsidiaries of BellSouth Corporation and Qwest Communications International Inc., and the Verizon Telephone Companies, provide voice and data telecommunications services to customers across the nation. Together they have over 72 million customers for wireline services.[2] They have invested and are continuing to invest billions of dollars in their networks to provide new services such as broadband Internet access to the home and to comply with the market-opening provisions of the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 ("1996 Act"). Many of their activities are subject to regulation under the Communications Act of 1934, ch. 652, 48 Stat. 1064 ("1934 Act"), as amended most recently by the 1996 Act. BellSouth, Qwest, and Verizon will be affected by the Court's determination of the extent to which those federal statutes allow disparate state regulation of the same activities.

INTRODUCTION AND SUMMARY

1. Even before the 1934 Act, Congress subjected the telecommunications industry to federal regulation, and displaced state regulation, in recognition that the industry is national in character and demands standardized treatment. This approach paralleled Congress's handling of other national network industries. Telecommunications networks connect homes and businesses in all 50 states to each other and to the world, and the services provided over those networks are oblivious to state boundaries. In adopting the 1996 Act, Congress maintained and strengthened the federal displacement of state regulation of this increasingly national and

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[2] BellSouth, "Business Profile," *available at* http://www.bellsouth.com/investor/ir_businessprofile.html (last visited May 27, 2003); About Qwest, "Company Fact Sheet," *available at* http://www.qwest.com/about/media/presskit/companyFact/ (last visited May 27, 2003); "Redesigned Verizon Bills Arriving this Month," *Associated Press Newswire*, May 5, 2003.

global industry. Congress sought to promote greater competition in telecommunications services by preempting state barriers to entry and by shifting from *a priori* federal regulatory controls to increased reliance on the marketplace to police carriers' practices.

2. The court of appeals wrongly read the 1996 Act as an invitation to the states to regulate in areas where state laws had been preempted under pre-1996 law. The court ruled that the Federal Communications Commission ("FCC"), in exercising its authority under the 1996 Act to remove the tariff-filing requirement for long distance services, opened the way for states to dictate the terms on which those services can be provided. Applying California law, the court struck from AT&T's customer service agreement an arbitration clause and other dispute resolution provisions that are valid and permissible under federal communications statutes. The lower court's decision is wrong and conflicts directly with the decision of a sister circuit.

The lower court decision also has implications far beyond the particular services and contract provisions involved here. It reverses the long-recognized principle that telecommunications, like other national network industries, requires standardized federal rules. When the FCC eliminated the tariff-filing requirement, it did not alter—but expressly reaffirmed—that such standardized rules govern here. The agency's decision to ease federal controls by eliminating tariffs—based on a congressional policy of relying on marketplace competition to police behavior—was not an invitation for new regulatory initiatives by the states.

The Court should grant certiorari to reaffirm the primacy of federal law in regulating the national telecommunications industry.

ARGUMENT

I. By Applying State Law To Control the Terms of Service of Interstate Telecommunications Carriers, the Decision Below Departs from Established Practice in Federal Regulation of Interstate Commerce.

Congress has recognized that network industries that are interstate in character require standardized national treatment. The Interstate Commerce Act of 1887, 24 Stat. 379 ("ICA"), and later federal laws modeled on that statute, including telecommunications laws, give broad effect to that recognition by intentionally displacing state regulation. The principle of uniformity did not disappear when Congress later determined that competition rather than close regulatory controls could achieve its goals. Congress did not leave a vacuum for states to fill with disparate requirements.

A. Congress regulated telecommunications, like other interstate network industries, because the national character of the network necessitates uniform national rules.

Congress typically has extended national regulation to network industries that, having originated on a local scale, subsequently spread across state lines to become predominantly interstate in character. When national networks were taking shape in the late nineteenth century, the Court recognized that such industries would require a "species of regulation . . . [that] cannot be safely and wisely remitted to local rules and local regulations . . . . [T]he regulation can only appropriately exist by general rules and principles, which demand that it should be done by the congress of the United States under the commerce clause of the constitution." *Wabash, St. L. & P. Ry. Co. v. State of Illinois*, 118 U.S. 557, 577 (1886). The Court in *Wabash* held that the Interstate Commerce Clause barred state regulation of rates for interstate rail transport. Congress then enacted the ICA to provide standardized national regulation.

As interstate industries became more complex, Congress enacted legislation particular to the individual networks. Although tailored to the specific industries, the emerging regulatory regimes preserved the national uniformity that the Court in *Wabash* recognized was necessary and that Congress implemented in the ICA. The ICA was the model for these subsequent statutes, such as the Federal Power Act of 1920, ch. 285, 41 Stat. 1063, the Natural Gas Act of 1938, ch. 556, 52 Stat. 821, and the Civil Aeronautics Act of 1938, ch. 601, 52 Stat. 973.[3] As with the ICA, these federal controls were enacted in recognition that the "state is restrained by the force of the commerce clause" and "if such regulation is required it can only be attained by the exercise of the power vested in Congress."[4]

For example, under the Federal Power Act, states could not regulate the terms of interstate electric power sales.[5] In the trucking industry, although state laws "with a view to safety or to conservation of the highways" were permitted, state economic measures that had the effect of "obstruct[ing]" interstate commerce were "forbidden by the commerce clause."[6] To meet the need for uniform national rules, Congress launched regulation of that industry in 1935 "on the premise that the public interest in maintaining a stable transportation industry so required."[7] The history of airline regulation is an exception that proves the rule. Departing from the trend established in other industries, early fed-

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[3] *See Verizon Communications, Inc. v. FCC*, 535 U.S. 467, 478 n.3 (2002).

[4] *Public Utils. Comm'n of R.I. v. Attleboro Steam & Elec. Co.*, 273 U.S. 83, 89-90 (1927).

[5] *Id.*

[6] *Buck v. Kuykendall*, 267 U.S. 307, 315-16 (1925) (without basis in safety to do so, state could not deny common carrier certificate of use for portion of public highway lying within state).

[7] *United States v. Drum*, 368 U.S. 370, 374 (1962).

eral airline legislation did not preempt state regulation but rather permitted the states to regulate interstate airfares.[8] But upon subsequent deregulation of the airlines, as discussed below, Congress expressly preempted such state regulation.

Congress similarly extended federal regulation to telecommunications in 1910, in recognition of the national scope of the telecommunications network. As we discuss below, the 1910 law preempted state regulation of interstate carriers' terms of service. Congress solidified federal control when it created the FCC in the 1934 Act.[9] And in the 1996 Act, Congress took even "the regulation of local telecommunications competition away from the States."[10]

B. Federal deregulatory measures in response to increased competition do not diminish the national scope of the issues or the primacy of national rules.

The principle enunciated by the Court in the late nineteenth century—that national networks necessitate national regulation—has not changed with competition and "deregulation." When the ICA was first enacted, the Court recognized that simultaneous state and federal assertion of authority would cause "a conflict . . . which would render the enforcement of the act impossible."[11] The "broad purpose of the commerce act was to compel the establishment of reasonable rates and the[ir] uniform application."[12] Congress's subsequent recognition that competition is feasible in many net-

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[8] *See Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 378 (1992).

[9] *See Verizon*, 535 U.S. at 478 n.3.

[10] *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 378 n.6 (1999).

[11] *Texas & Pac. Ry. Co. v. Abilene Cotton Oil Co.*, 204 U.S. 426, 441 (1907).

[12] *Chicago & Alton R.R. Co. v. Kirby*, 225 U.S. 155, 166 (1912).

work industries did not alter that purpose; it merely introduced reliance on competition as a preferred means of achieving it. "[T]o permit separate suits and separate findings would not only destroy the equality which the statute" and its successors "intended should be permanent, . . . but it would bring about direct conflict in the administration of the law."[13]

Thus, when Congress has eased federal regulation of national networks, it has retained the preeminence of national rules. This is true with the ICA and its progeny statutes. For example, Congress began deregulating the railroad industry in the 1970s and 1980s in order to "assure[] railroads substantially more rate freedom than [is] afforded them under [then] existing law."[14] The congressional drafters "intend[ed] that competition be recognized as the best control on the ability of railroads to raise rates" and thus expressly preempted "state authority over rail rates, classifications, rules and practices."[15] In so limiting state powers, Congress acknowledged that free reign for state regulation would have conflicted with "[t]he purpose of [the] legislation . . . to reverse the decline of the railroad industry, which has been caused, in part, by excessive government regulation."[16]

Likewise, in 1980, Congress passed a law substantially deregulating interstate trucking. The Motor Carrier Act of 1980, Pub. L. No. 96-296, 94 Stat. 793, was enacted "[a]fter

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[13] *Mitchell Coal & Coke Co. v. Pennsylvania R.R. Co.*, 230 U.S. 247, 259 (1913).

[14] Staggers Rail Act of 1980, H.R. Conf. Rep. 96-1430, 1980 U.S.C.C.A.N. 4110.

[15] *Id.* at 4120; 49 U.S.C. § 11501(b)(1); *see also* H.R. Conf. Rep. No. 96-1430, 1980 U.S.C.C.A.N. 4110, 4138 (preemption necessary to "ensure that the price and service flexibility and revenue adequacy goals of the [Staggers] Act are not undermined by state regulation of rates, practices, etc.").

[16] H.R. Conf. Rep. No. 96-1430, 1980 U.S.C.C.A.N. at 1420.

years of debate over whether it was sound policy to substitute regulation for competition in the motor carrier industry."[17] Ultimately, "Congress decided to eliminate the regulatory barriers to free entry and individual ratemaking. The 1980 amendments to the [ICA] represented a fundamental policy choice in favor of deregulation."[18] In interpreting Congress's deregulatory measures in the trucking industry, the Court concluded that state regulation must be preempted where it conflicts with the federal scheme.[19]

In the same way, when Congress deregulated the airlines in 1978, it recognized that "maximum reliance on competitive market forces would best further efficiency, innovation, and low prices as well as variety [and] quality . . . of air transportation services."[20] "To ensure that the States would not undo federal deregulation with regulation of their own, the [Airline Deregulation Act] included a pre-emption provision, prohibiting the States from enforcing any law relating to rates, routes, or services of any air carrier."[21] The Court has twice since acknowledged Congress's objective and has preserved standardized rules for the airline industry by invalidating states' attempts to impose disparate controls.[22]

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[17] *Maislin Indus., U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116, 147 (1990) (Stevens, J., dissenting).

[18] *Id.*

[19] *See, e.g., Kassel v. Consol. Freightways Corp. of Delaware*, 450 U.S. 662 (1981) (invalidated state restriction on truck length); *City of Columbus v. Ours Garage & Wrecker Service, Inc.*, 536 U.S. 424, 442 (2002) (state regulation in the trucking industry is limited to "safety"; "[l]ocal regulation of prices, routes, or services of tow trucks that is not genuinely responsive to safety concerns garners no exemption from § 14501(c)(1)'s preemption rule").

[20] *Morales*, 504 U.S. at 378 (internal quotation marks omitted).

[21] *Id.* at 378-79 (internal quotation marks omitted).

[22] *See, e.g., American Airlines, Inc. v. Wolens*, 513 U.S. 219 (1995) (class action suit under state consumer fraud act challenging airline's fre-

C. In the telecommunications arena, it is established that deregulatory steps at the federal level do not reduce the primacy of national rules or permit application of 50 state rules to a nationwide industry.

The changes in federal telecommunications law in recent decades also have not lessened the preemption of disparate state rules. When the FCC deregulated telephone customer premises equipment ("CPE") in the 1970s, the agency and the courts held that the need for national rules remained and that application of state law was precluded. "If each State were to be free to establish its own rules governing interconnection [of CPE] for the purposes of intrastate services, uniform nondiscriminatory interstate service throughout the country would be rendered difficult if not impossible."[23]

Similarly, federal determinations have preemptive effect in the new regime created by the 1996 Act. In that statute, Congress directed the FCC to determine which elements of an incumbent local exchange carrier's network must be unbundled and provided to competitors at regulated prices.[24] When the FCC adds—or subtracts—an element from the list of unbundled elements, the states are precluded from adopting 50 different rules that deviate from the national determination. As this Court ruled in *Iowa Utilities Board*, "the

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quent flyer program preempted by Airline Deregulation Act; but state law breach of contract claims allowed); *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374 (1992) (Airline Deregulation Act preempts states from prohibiting allegedly deceptive airline fare advertisements through enforcement of their general consumer protection statutes).

[23] Memorandum Opinion and Order, *Telerent Leasing Corp., et al. Petition for Declaratory Rulings on Questions of Federal Preemption on Regulation of Interconnection of Subscriber-Furnished Equipment to the Nationwide Switched Public Telephone Network*, 45 F.C.C.2d 204, 219-20 ¶ 37 (1974), *aff'd, North Carolina Utils. Comm'n v. FCC*, 537 F.2d 787 (4th Cir. 1976).

[24] 47 U.S.C. § 251(d)(2).

Federal Government has taken the regulation of local telecommunications competition away from the States," and the FCC may therefore "draw the lines to which [the states] must hew," lest the industry fall into the "surpassing strange" incoherence of "a federal program administered by 50 independent state agencies" without adequate federal oversight.[25]

Likewise, when Congress moved to partially deregulate mobile wireless services, it expressly forbade the states from regulating rates or entry by mobile service providers.[26] Congress permitted state regulation of "other terms and conditions" of mobile services, but only to the extent that such regulation does not amount to regulation of rates.[27] States may petition the FCC for authority to regulate mobile wireless rates, but the FCC has uniformly denied such requests.[28]

Finally, nothing in the FCC's Detariffing Orders involved here eliminated the primacy of federal law with respect to the terms of service.[29] To the contrary, as discussed

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[25] *Iowa Utils. Bd.*, 525 U.S. at 378 n.6.

[26] 47 U.S.C. § 332.

[27] *See Bastien v. AT&T Wireless Servs., Inc.*, 205 F.3d 983, 988 (7th Cir. 2000) (state-law complaint that service provider offered service before its network was adequately built out was a forbidden attempt to regulate rates on grounds that "a complaint that service quality is poor is really an attack on the rates charged for the service").

[28] *E.g.*, Report and Order, *Petition of the State of Ohio for Authority to Continue to Regulate Commercial Mobile Radio Services*, 10 FCC Rcd 7842 (1995); Report and Order, *Petition of the Connecticut Department Public Utility Control to Retain Regulatory Control of the Rates of Wholesale Cellular Service Providers in the State of Connecticut*, 10 FCC Rcd 7025 (1995), *aff'd*, *Connecticut Department of Public Utility Control v. FCC*, 78 F.3d 842 (2d Cir. 1996).

[29] Second Report and Order, *Policy and Rules Concerning the Interstate, Interexchange Marketplace*, 11 FCC Rcd 20730, 20732-33 ¶ 3 (1996) ("Detariffing Second Report and Order"); Order on Reconsideration, *Policy and Rules Concerning the Interstate, Interexchange Market-*

below, the FCC confirmed that federal law would continue to govern, and the courts have agreed—except for the court of appeals in the decision below.[30]

II. The Decision Below Destroys the Uniform Application of Federal Law in the Telecommunications Arena, Which has Prevailed for Over 90 Years.

By sanctioning the application of California law to determine the lawfulness of the terms on which AT&T provides long-distance services, the court of appeals disregarded 90 years of settled law that federal law exclusively governs the terms of those services. Court decisions that predated the tariff-filing requirement of the 1934 Act established that, whether or not a service is tariffed, the lawfulness of its terms is to be judged against a uniform federal "just and reasonable" standard, *not* the varying standards that might be found in the laws of the 50 states. Nothing in the FCC's post-1996 Act orders lifting the tariff-filing requirement diminished the primacy of federal law as to the terms of those services. In holding to the contrary, the court of appeals fundamentally

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place, 12 FCC Rcd 15014, 15056-57 ¶ 76 (1997) ("Detariffing Reconsideration Order") (together "Detariffing Orders").

[30] *See, e.g., Boomer v. AT&T Corp.*, 309 F.3d 404, 420, 422 (7th Cir. 2002) ("[D]etariffing does not alter the fundamental design of the Communications Act, nor modify Congress's objective of uniformity in terms and conditions for all localities. . . . [A]llowing state law to determine the validity of the various terms and conditions agreed upon by long-distance providers and their customers [would] create a labyrinth of rates, terms and conditions and this violates Congress's intent in passing the Communications Act."); *In re Universal Serv. Fund Tel. Billing Practices Litig.*, 247 F. Supp. 2d 1215, 1229-30 (D. Kan. 2002) (even after the FCC's mandatory detariffing of interstate services, state-law conversion claims challenging interstate carriers' universal service charges "will necessarily become enmeshed in questions of the justness or reasonableness" of rates and must therefore be governed exclusively by sections 201 and 202).

misconceived the relationship between federal and state law in the important telecommunications sector.

A. The primacy of federal law on the terms of service predates the requirement to file tariffs.

In the Mann-Elkins Act of 1910, ch. 309, 36 Stat. 539, Congress for the first time asserted federal control over the terms of service by telephone and telegraph carriers. The 1910 statute extended to those carriers the prohibitions of the ICA against any "unjust or unreasonable or unjustly discriminatory . . . classification, regulation, or practice." The statute further authorized the Interstate Commerce Commission ("ICC") to enforce those standards against the carriers in complaint proceedings.[31] These national standards were not embodied in a tariff provision: The Mann-Elkins Act did not require carriers to file tariffs with the ICC, nor did it even allow them to do so without "permission."[32]

This federal enactment was recognized from the outset to preempt state law. In *Postal Telegraph-Cable Co. v. Warren-Godwin Lumber Co.*, the Court held that federal law, not state law, governed the validity of a contractual provision limiting a carrier's liability for negligence in forwarding messages. The Court noted that the ICA, as amended by the Mann-Elkins Act, "was an exertion by Congress of its authority to bring under federal control the interstate business of telegraph companies and therefor[e] was an *occupation of the field* by Congress which *excluded state action*."[33] In *Western Union Telegraph Co. v. Boegli*, the Court forbade

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[31] Mann-Elkins Act, §§ 7, 11, 36 Stat. 539, 545, 551 (1910).

[32] *Western Union Tel. Co. v. Esteve Bros. & Co.*, 256 U.S. 566, 571 (1921); *see also Essential Communications Sys., Inc. v. AT&T Co.*, 610 F.2d 1114, 1118 (3d Cir. 1979) (noting that Mann-Elkins Act did not subject interstate telecommunications carriers to mandatory filed-rate provisions of the ICA that had previously been imposed on railroads).

[33] 251 U.S. 27, 30-31 (1919) (emphasis added).

the imposition of liability under state law for failure promptly to deliver an interstate telegram—an issue not covered by the carrier's voluntarily filed tariff—because the ICA "so clearly establish[es] the purpose of Congress to subject [telegraph] companies to a uniform national rule as to cause it to be certain that there was no room thereafter for the exercise by the several states of power to regulate."[34] The Court has expressly held that tariff filings, where permitted, are merely "procedural features" of the ICA, and that the preemptive effect of the statute "flows from the requirement of equality and uniformity of rates laid down in Section 3 of the [ICA]."[35]

These cases reflect the recognition, discussed in Part I, *supra*, that the interstate nature of the telecommunications network necessitates the application of national regulatory standards. As one court noted following the enactment of the Mann-Elkins Act, "[t]he great necessity that commerce between the states should be free from . . . interference [by state laws] applies in a marked degree to interstate commerce by telegraph."[36] This was because, if interstate telecommunications carriers' terms of service "should be held valid in Kansas, and void in Oklahoma, and the illustration may be extended to all the states of the Union, then the power of the United States to regulate commerce between the states in relation to telegraphic business would not only be directly interfered with, but destroyed."[37]

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[34] 251 U.S. 315, 316 (1920).

[35] *Esteve Bros.*, 256 U.S. at 573. As discussed in the text below, section 3 of the ICA is the predecessor of sections 201(b) and 202(a) of the 1934 Act.

[36] *Gardner v. Western Union Tel. Co.*, 231 F. 405, 412 (8th Cir. 1916).

[37] *Id.*

When Congress adopted the 1934 Act, it preserved and reaffirmed this federal occupation of the field. The 1934 Act created the FCC to regulate telecommunications, and required for the first time that telecommunications carriers file federal tariffs for their interstate services.[38] Congress left intact the substantive standards that had applied to interstate telecommunications carriers under the ICA: requirements that those carriers have "just and reasonable" "charges, practices, classifications, and regulations" (section 201(b)) and that they refrain from engaging in "unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services" (section 202(a)).[39] These provisions were copied from the ICA almost verbatim in order to "preserve the value of court and commission interpretations of that act" as to telecommunications carriers.[40]

Until the decision below, the courts of appeals had recognized that the 1934 Act continued the preemption of state-law with respect to the terms of interstate carriers' services. Under the 1934 Act, it remained the case that "questions concerning the duties, charges and liabilities of telegraph or telephone companies . . . are to be governed solely by federal law and . . . the states are precluded from acting in this area."[41] In fact, where "neither the Communications Act it-

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[38] *See* 47 U.S.C. §§ 151, 203.

[39] *Id.* §§ 201(b), 202(a).

[40] H.R. Rep. No. 73-1850, at 4 (1934).

[41] *Ivy Broad. Co. v. AT&T Co.*, 391 F.2d 486, 491 (2d Cir. 1968); *see also Long Distance Telecomms. Litig. v. ITT-U.S. Transmission Sys., Inc.*, 831 F.2d 627, 634 (6th Cir. 1987) (where suit under state law confronts "implied congressional purpose to require uniformity and equality of service . . . by communications companies, . . . state law [cannot] apply"); *Nordlicht v. New York Tel. Co.*, 799 F.2d 859, 864 (2d Cir. 1986) ("[T]he need for uniformity is the reason . . . that federal common law preempts state law and supplies the rule of decision for tort and contract claims relating to the duties, charges, and liabilities of telephone carriers concerning interstate telecommunications.").

self nor the tariffs filed pursuant to the Act deal with a particular question," the dispute should be governed by "a uniform rule of federal common law."[42] The 1934 Act authorized the states, with some exceptions, to regulate purely intrastate telecommunications services.[43] As noted in Part I above, Congress in 1996 largely rescinded that carve-out by preempting state barriers to entry and by prescribing federal market-opening requirements that take "the regulation of local telecommunications competition away from the States."[44]

The addition in 1934 of a tariff-filing requirement—bringing with it the filed-tariff doctrine, which forbade provision on terms other than those in the tariff[45]—was, of course, entirely consistent with the preservation of uniform federal standards. In the absence of substantial competition, the tariff-filing requirement gave the FCC an enforcement device to ensure that carriers' rates and terms of service would adhere to the substantive standards in the Act.[46]

But the tariff-filing requirement was just as clearly not the source of those substantive standards, or of the federal

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[42] *Ivy Broad. Co.*, 391 F.2d at 491; *see also McDermott v. Western Union Tel. Co.* 746 F. Supp. 1016, 1020 (E.D. Cal. 1990) (Even though Congress has declined to require providers of interstate money transfer services to file tariffs, federal common law must apply to plaintiff's complaint for misrepresentation and intentional infliction of emotional distress because there is no evidence that Congress "limited the broad scheme that it set in place for regulating communications carriers.").

[43] Communications Act of 1934, § 2(b), 47 U.S.C. § 152(b) (amended 1996).

[44] *Iowa Utils. Bd.*, 525 U.S. at 378 n.6; *see* 47 U.S.C. §§ 251-253, 271.

[45] *Maislin Indus.*, 497 U.S. at 129.

[46] *See MCI WorldCom, Inc. v. FCC*, 209 F.3d 760, 762 (D.C. Cir. 2000) (1934 Act's tariff provision "require[d] the FCC to review telecommunications carriers' tariffs *to ensure their reasonableness*") (emphasis added).

occupation of the field. Rather, it "merely served as a mechanism by which the FCC could assure compliance with the standards set forth in Sections 201 and 202."[47]

Indeed, the complete independence of the federal standards of sections 201(b) and 202(a) from the tariff-filing requirement is illustrated by the FCC's pre-1996 Act decisions detariffing long distance services. When the FCC tried to order detariffing prior to the 1996 Act, it emphasized that it was not doing away with the requirements of sections 201 and 202. The agency declared: "We have not eliminated the requirements that rates be just, reasonable and non-discriminatory. We have merely changed the method by which we will police that requirement."[48] It explained that "we have determined that tariffs are not essential to our ability to ensure that non-dominant carriers do not unjustly discriminate in their rates. We have other means to ensure our enforcement of mandates of the Act. In particular, we shall continue to investigate and adjudicate complaints under Section 208."[49] The Court's subsequent finding that the FCC lacked detariffing authority under the 1934 Act[50] led Congress to grant that authority in the 1996 Act, setting the stage for the Detariffing Orders involved here.

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[47] *Boomer*, 309 F.3d at 421; *see also AT&T Co. v. Central Office Tel., Inc.*, 524 U.S. 214, 228 (1998) (rejecting application of state-law remedy permitted under tariff because doing so could create an unlawful "preference[]" under 47 U.S.C. § 202(a)).

[48] First Report and Order, *Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor*, 85 F.C.C.2d 1, 4 ¶ 6 (1980).

[49] Sixth Report and Order, *Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor*, 99 F.C.C.2d 1020, 1028-30 ¶ 12 (1985), *vacated and remanded on other grounds, MCI Telecomms. Corp. v. FCC*, 765 F.2d 1186 (D.C. Cir. 1985).

[50] *See MCI Telecomms. Corp. v. AT&T Co.*, 512 U.S. 218, 234 (1994).

B. The FCC's post-1996 Act Detariffing Orders expressly did not change the exclusive application of federal law to the terms of service.

The court below misconceived the nature of the regulatory change brought about by the 1996 Act. That court ruled that the 1996 Act's "chosen means" of enforcing the "just and reasonable" standard of sections 201(b) and 202(a) was federal "deregulat[ion]," allowing state law to enter in where it previously was displaced.[51] To the contrary, where Congress has occupied the field, a relaxation of federal controls does not turn the field over to the states. The Detariffing Orders expressly confirm the FCC's intent in exercising its forbearance power to maintain the primacy of federal law governing carriers' terms of service. The orders also confirm the FCC's intent to permit state law to come into play only as to the formation or breach of the contractual "legal relationship between the carrier and customer."[52]

In section 10 of the 1996 Act, Congress authorized the FCC to forbear from enforcing any provision of the 1934 Act, as amended, or any regulation adopted thereunder. That authority is conditioned on the FCC's finding, *inter alia*, that enforcement of the provision in question is not necessary to ensure that the relevant terms of service "are just and reasonable and are not unjustly or unreasonably discriminatory."[53] Congress went on to declare that, after the FCC decides to forbear from enforcing a provision of the Act or one of its rules, no state may contradict the FCC's determination by enforcing that statutory or regulatory provision.[54] Congress thus anticipated that the states might attempt to step in to

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[51] *See* App. 22a-32a.

[52] *Detariffing Reconsideration Order*, at 15057 ¶ 77.

[53] 47 U.S.C. § 160(a).

[54] *Id.* § 160(e).

regulate where the FCC has forborne, and it expressly forbade that.

Soon after the passage of the 1996 Act, the FCC found that detariffing of long-distance services met the forbearance criteria, based on the presence of competition in the marketplace, and consequently ordered the carriers to cancel their FCC tariffs.[55] In so doing, the FCC expressly preserved the exclusive application of federal law (including the substantive standards in sections 201(b) and 202(a)) to the terms of service. The agency emphasized that, after lifting the tariff-filing requirement of section 203, it would "continue to examine legal, and, where appropriate, policy matters *to give full effect* to the requirements that a carrier's rates, terms, and conditions are just, reasonable, and not unreasonably discriminatory, as well as the requirements of [FCC] rules and orders."[56] In rejecting claims that consumers would be inadequately protected under this regime, the FCC noted that its "administration of the Section 208 complaint process" for enforcement of federal standards, combined with "market forces" and its ability to reimpose tariffs in the future, if necessary, would be sufficient to protect consumers.[57]

AT&T sought clarification of the order on precisely the point at issue here: "that federal, and not state, law governs the determination" whether a carrier's rates and terms of ser-

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[55] *See Detariffing Second Report and Order*, at 20732-33 ¶ 3.

[56] *Id.* at 20746 ¶ 26 (emphasis added).

[57] *Id.* at 20750 ¶ 36. In resting its detariffing decision in part on the continued applicability of sections 201, 202, and 208 to the detariffed services, the FCC did not suggest that it lacks authority to forbear from applying those sections in an appropriate case. Section 10 authorizes forbearance from the application of "any provision" of the amended 1934 Act, with qualifications not here relevant. 47 U.S.C. § 160(a), (d). Any such forbearance decision would leave state law preempted, unless the agency or Congress expressly authorizes the application of state law.

vice are just and reasonable.[58] AT&T asked the FCC to make clear that the door was closed to "challenges under state law to the lawfulness of rates, terms, and conditions for . . . interstate services."[59] In response, the agency expressly "agree[d]" with AT&T that "the Communications Act *continues to govern* determinations as to whether rates, terms and conditions for interstate, domestic, interexchange services are just and reasonable, and are not unjustly or unreasonably discriminatory."[60] State law, the agency said, may be applied only to "*other issues*, such as contract formation and breach of contract, that arise in a detariffed environment." In the absence of tariffs, the source of the legal relationship between the carriers and the customer is contract, and "state consumer protection and contract laws" can be applied to "issues regarding the legal relationship between the carrier and customer."[61]

In short, the FCC's regime permits state law to be applied to issues "such as contract formation and breach of contract."[62] But it does not permit a customer to *challenge under state law* the terms of service, because the lawfulness of those terms is governed exclusively by federal law.[63]

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[58] *See Detariffing Reconsideration Order*, at 15056-57 ¶ 76.

[59] *Id.*

[60] *Id.* at 15057 ¶ 77 (emphasis added).

[61] *Id.* (emphasis added).

[62] *Id.*

[63] *See Boomer*, 309 F.3d at 421 (to permit challenges to terms of CSAs under state unconscionability standards "would open the door for direct conflicts between federal and state law on the validity of terms and conditions contained in a long-distance service contract"); *Universal Serv. Billing Practices*, 247 F. Supp. 2d at 1229-30 (refusing to entertain state law claims that "will necessarily become enmeshed in questions of the justness or reasonableness" of rates and must therefore be governed exclusively by sections 201 and 202).

Consumers have federal remedies for any violations of the governing federal standards. They may file a complaint at the FCC under section 208 or go to federal district court under section 207. But the challenges must be brought as a matter of federal law, under the standards of sections 201(b) and 202(a). The FCC has found that the availability of these fora affords customers adequate protection against unlawful practices by interstate carriers. In the Detariffing Orders, the agency found, as it had in its pre-1996 Act detariffing proceedings, that its complaint process, combined with market forces, would fully ensure that interstate carriers' terms and conditions would remain "just and reasonable" and not "unjustly . . . discriminatory."[64]

In sum, the Detariffing Orders expressly did not disturb the primacy of federal law that has prevailed in this area for nearly a century. "[E]ven though the FCC no longer mandates the filing of tariffs, the congressional objective of providing uniform rates, terms and conditions remains, as does the federal prohibition on terms and conditions which are unjust or unreasonable."[65] The Ninth Circuit's decision improperly disrupts this federal uniformity by opening the door to disparate state-law standards, and thereby threatens the efficient regulation of the national telecommunications industry.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

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[64] *Detariffing Second Report and Order*, at 20742-43 ¶ 21.

[65] *Boomer*, 309 F.3d at 421-22.

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